

San Francisco Bay Conservation and Development Commission

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September 14, 2015

Mr. Douglas B. Aikins
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303 Twin Dolphin Drive, Suite 600
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SUBJECT: Version 5 of Permit No. 2002.002.05
(Permit File No. 2002.002.03 and Enforcement File No. ER2010.013)

Dear Mr. Aikins:

This letter responds to your memorandum to Mr. McCrea, Mr. Bowers, Mr. Buehmann and me, dated December 22, 2014, submitted by email on the same date. For clarity, our response to your letter employs the paragraph headings used in your memorandum.

First, we would like to reiterate that we have previously issued four versions (V) of Permit No. 2002.002.05 on September 9, 2012 (V1), May 20, 2013 (V2), June 6, 2013 (V3), and September 4, 2014 (V4), as described in the last paragraph on Page 3, and first paragraph on Page 4, of our letter to you, dated September 4, 2014.¹ We issued these four versions of the permit in response to Mr. Sanders' concerns with specific aspects of the authorization, special conditions and findings and to resolve many permit violations initially described in our letter dated May 4, 2011.

In response to each of these four versions of the permit, Mr. Sanders has declined to execute the permit and instead he and you have found fault with the language of each version, including in your most recent memorandum, dated December 22, 2014. Therein, you state that most of the requested changes pertain to newly added language to Permit No. 2002.002.05 issued on September 4, 2014. While we are heartened by the fact that you state the scope of disagreement has substantially narrowed, the changes you now reject, or request further modifications to, are changes that staff made at Mr. Sanders' or your request.

Nevertheless, attached is a fifth draft version of Permit No. 2002.002.05, dated September XX, 2015. At your request, this amendment modifies the permit as follows:

1. On pages 10 and 11, it eliminates new item "f," moves the phrase "that replaces Phase 1B pathways (Amendment No. Five)" from item "f" to item "a," and converts former item "g" to item "f" of Special Condition II.B.4.Phase Three;

¹ We erred in our letter to you, dated September 4, 2014, by stating that Permit No. 2002.002.05, issued on September 4, 2014, was the third version of the fifth amendment to the permit.

2. On page 11, it adds the word "staff" to the underlined phrase "...and be included in the marina best management practices following Commission **staff** approval (Amendment No. Five)" to Special Condition II.B.7, Reasonable Rules and Restrictions;
3. On page 35, we have modified the findings to better explain that Permit 2002.002.05 results in the reduction of the number of restrooms from three to two and relocates on water public access from the guest berth docks to the fuel dock;²
4. On page 39, it replaces the language of Standard Condition K, Should Permit Conditions Be Found to be Illegal or Unenforceable, with the language of Permit No. 2002.002.03; and
5. We have added a notation to Exhibit A2 that reads, "[t]his drawing is intended only to illustrate public access phasing." As described below, we will replace Exhibits A1 and A2 with new exhibits if Mr. Sanders still believes this is necessary and if he supplies those exhibits.

We have also made two changes that you have not requested. First, we have added a notation to Exhibit A1 that reads, "[t]his drawing is intended only to illustrate required public access areas". Second, to make an existing requirement explicit, on page 8 we have added a sentence to Special Condition II.B.2, Permanent Guarantee, that reads, "Prior to the use of occupancy of any of the Phase Two structures of the project, the permittee shall, by instrument or instruments acceptable to counsel for the Commission, dedicate to a public agency or otherwise permanently guarantee such rights for the public to the new, approximately 298,000-square-foot public access area (Amendment No. Five)."

As described in the first paragraph on page 4 of our letter to you, dated September 4, 2014, unless and until Mr. Sanders executes his favored version of Permit No. 2002.002.05, he is bound by the terms and conditions of Permit No. 2002.002.03, issued on November 1, 2006 and executed by Mr. Sanders on November 7, 2006. Permit No. 2002.002.05 resolves many of the violations of Permit No. 2002.002.03. Please inform us at your earliest opportunity, but in no case later than 30 days from the date of this letter, if Mr. Sanders is willing to sign this amendment, at which point we will issue a final copy of this draft with the usual cover letter, checklist, Notice of Completion form and Recorder's Copy of the permit.

² Looking ahead, upon issuance of Permit No. 2002.002.06, we plan to modify the description of the "fuel dock" throughout the permit to read the "fuel/pump out/service dock" to reflect its new name, as shown on the plans entitled "Westpoint Harbor – Phase 2 Boatyard Buildings," dated May 12, 2015, and prepared by DES Architects and Engineers.

Memo heading "Attached Drawings." In the paragraph titled "Attached Drawings," you state that the drawing used as the exhibit to Permit 2002.002.05 dates from 2003 and was rendered obsolete in 2006 because building locations, floating dock layout, boatyard, rowing center and retail areas are erroneous in the drawing. You go on to say that the drawings used as the exhibit for Permit No. 2002.002.03 correctly show the phasing and should be used for Permit No. 2002.002.05 so that the permit text and drawing match to avoid confusion.

With the exceptions noted below, the drawings used for Permit No. 2002.002.05 are for Permit No. 2002.002.03 and Permit No. 2002.002.05 are identical. They are identically titled and both dated 27 June 2003. As explained in Section VI.1, pp. 19 – 20, of our letter to you, dated September 4, 2014, the sole purpose of Exhibit A1 of the permit is to depict the required public access area, which remains the same since issuance of the original permit with the exception, if Mr. Sanders executes Permit No. 2002.002.05, of the transfer of on water public access from the guest berth docks to the fuel dock. At your request, we updated Exhibit A1 to: (1) replace covered docks, which Mr. Sanders elected not to build, with open air docks; (2) show that there are two separate guest berth docks, rather than a single, long one; and (3) move the on water access from the guest berth dock to the fuel dock. We therefore believe Exhibit A1 generally reflects the authorized project by Permit No. 2002.002.05 and, most importantly, specifically reflects the required public access, with the exception of the changes to the configuration of the fuel/pumpout/service dock that we anticipate with pending Amendment No. Six.

If you do not agree that this image correctly reflects the project authorized by both Permit No. 2002.002.03 and Permit No. 2002.02.05, please explain the specific discrepancies between the authorization and the exhibit and submit a revised image that staff will use as Exhibit A1 (and Exhibit A2) to the permit. To reiterate, any map submitted must reflect the project as authorized rather than as proposed. We agree that a new exhibit showing the 2,600 square foot fuel/pumpout/service dock should be part of Permit No. 2002.002.06, which we anticipate issuing shortly.

To create Exhibit A2, which depicts the phasing of the public access with the build out of the project, we added lines to denote the three phases of build out. As Version 4 of Permit No. 2002.002.05 also shifted the due date for public access at the boat launch ramp from Phase 1B to Phase 2, Exhibit A2 was modified accordingly, as discussed above.

Your letter states that the permit's drawing (i.e. exhibit/s) should match those recorded with San Mateo County in 2006. Conversely, a new CC&R describing the currently required public access should be prepared, approved by staff and subsequently recorded with San Mateo County, if and when Mr. Sanders executes Permit No. 2002.002.05, which alters the existing public access requirements.

Memo heading "page 4 Phase 3 para 1. "New Restroom." In this comment you state that the requirement to provide a second restroom as part of Phase 3 contained in item "b" of Special Condition II.B.4.Phase Three of Permit No. 2002.002.05, issued on September 4, 2014, "...is a new condition...." To the contrary, Special Condition II.B.4.f of the original permit, issued on August 21, 2003, Amendment No. One issued on March 9, 2004, and Amendment No. Two issued on November 1, 2006, each require the construction of three restrooms as follows: "[o]ne public restroom, provided within the Harbormaster's building and two public restrooms in the marina basin area..."

As stated in items 1 and 4 on page 20 of our letter, dated September 4, 2014, Permit No. 2002.002.05, issued on September 4, 2014, reduces the requirement to provide three restrooms and replaces it with a requirement to provide two restrooms.

Therefore, it is a misstatement of fact that the requirement to provide two public restrooms outlined in Permit No. 2002.002.05 "...is a new condition..." when in fact Amendment No. 5 relieves Mr. Sanders of the requirement to provide a third restroom. As such, we will not administratively remove the requirement to provide two public restrooms from the permit. The second restroom is required to be available prior to the use of the use of the Phase 3 improvements authorized by the permit. No public restroom is required as part of Phase 2.

While rendered moot by the above facts, we will also respond to your statement that Andrea Gaut agreed that only one restroom need be required and that this agreement was formalized by letter from her. You have not provided a copy of the letter to which you refer, nor is any such letter present in the Commission's files. As described in Section IV on pg. 5 of our letter, dated September 4, 2014, the staff cannot amend the permit's requirements by letter or agreement and absent the issuance of a new amendment. As no such amendment was issued, the alleged "agreement" was not completed.

Memo heading Page 11 item 7 "Best Management Practices." In response to your comment that the Commission should not review WPH's Management and Operations Manual, the staff agrees. As such, and as stated above, we have revised the language of Special Condition II.B.7, Reasonable Rules and Conditions, by adding the word "staff" after the word "Commission" so the sentence now reads "[r]ules may include restricting hours of use and delineating appropriate behavior and be included in the marina best management practices following Commission staff approval (Amendment No. Five)." Nevertheless, the current staff agreement to reduce the requirement to provide three restrooms will be completed if Mr. Sanders executes Permit No. 2002.002.05.

Memo heading Page 38 item K "Required Court Action." In this comment you express displeasure with a revision we made to Standard Condition K, Should Permit Conditions Be Found to be Illegal or Unenforceable, to add the language "if a court of competent jurisdiction finds" before the phrase "...finds any term, standard condition, or special condition of this amended permit to be illegal or unenforceable through the application of statute, administrative ruling, or court determination." We made the first change in response to

concerns you expressed about this condition in your memo, dated September 25, 2013. Since our revision has failed to elicit your approval, we have replaced the language of Special Condition K with the original language from Permit No. 2002.002.03, as requested in the final sentence of this paragraph of your memo.

You also allege, as you have in the past, that five other agencies "...have advised BCDC staff that some [BCDC] permit conditions violate requirements in areas where those agencies have primary jurisdiction," and that two agencies "...previously objected to 'BCDC actions which overstep its authority.'" Contrary to your assertion, the Commission has received no communication from any other public agency asserting that the authority exercised by that agency preempts or otherwise has priority over the authority that the Commission exercises under the McAteer-Petris Act. As stated in the first full paragraph of Subsection 5 on page 14 of our letter to you, dated September 4, 2014, if indeed a permittee finds a conflict in complying with two agencies' requirements, the permittee may not unilaterally ignore one requirement and must bring his concern to the responsible agencies' collective attention.

Memo heading Page 10 Phase Two item f "Fuel Dock." In the paragraph that discusses the fuel dock, you state that it will not be a fuel dock until Mr. Sanders has installed fuel tanks, dispensers and spill controls, all of which, you also state, require special permits, and, therefore, that Mr. Sanders cannot provide public access on this dock until these features have been installed.³ Thank you for clarifying these construction details and your current position.

Special Condition II.B.4.Phase 2 requires all of the Phase 2 public access improvements to be available to the public prior to use of any of the Phase 2 facilities authorized in Section I.A.Phase 2 on page 4 of Permit No. 2002.002.05. Therefore, the fuel dock must be open to the public and posted as such with BCDC staff-approved public shore signs prior to the use of any Phase 2 facilities. Therefore, Mr. Sanders must ensure that he has installed the equipment on the fuel dock to make it an operable fuel dock before he makes any use of the Phase 2 boatyard facilities. Alternately, Mr. Sanders can open this dock to public access in advance of its becoming an operable fuel dock.

If Mr. Sanders opens the dock for public access prior to its use as a fuel dock, the permit provides for temporary closures of the public access, such as, in this case, for public safety purposes during the installation of the fueling features. Mr. Sanders may temporarily close the fuel dock to install the fuel tanks, dispensers and spill controls you describe, following the

³ As part of Amendment No. Six, we see that you now wish refer to the fuel dock as the fuel/pumpout/service dock (and also as "V" dock rather than "M" dock), and that it will be used for vessel repairs and fueling, as per the plans entitled "WestPoint Harbor – Phase 2 Boatyard Buildings," dated May 12, 2015, and prepared by DES Architects and Engineers. With the future issuance of Permit No. 2002.002.06, we plan to update the permit's references to the "fuel" dock to instead read "fuel/pumpout/service" dock. It would be appropriate as part of Amendment No. Six to provide new Exhibits A1 and A2 to reflect the revised layout of the "M," "L" and "V" docks, with shading on "V" dock representing public access, assuming that Mr. Sanders will execute Permit No. 2002.002.05.

procedure outlined in Special Condition II.B.7, Reasonable Rules and Conditions. This procedure includes notifying staff in writing of his construction plans and the time period of the proposed closure. Staff would respond in writing to approve a temporary closure, assuming it is for a reasonable period of time and that period of time is posted with a public notice.

In summary, the permit requires that this dock be accessible to the public at all times following boatyard occupancy unless express written approval for a temporary closure has been issued by staff in writing.

In a letter to Bob Batha from Dawn Jedkins, dated July 20, 2015, she requested an additional permit amendment for three reasons as follows:

1. To expand the authorization of a 500-square-foot fuel dock to a 2,600-square-foot boatyard service dock, including a 500-square-foot section for fueling and pumpout facilities;
2. To expand the authorization for the boat launch ramp from 2,160 square feet to 3,600 square feet; and
3. To authorize the construction, use and maintenance a storm water runoff management systems comprised of two bio-retention basins of approximately 8,000 square feet.

As outlined in the attached letter to Ms. Jedkins, dated August 19, 2015, regarding item 1, please confirm that Mr. Sanders plans to make the entire fuel/pumpout/service dock open to the public and how that is compatible with vessel services, in the hopeful event that he executes Permit No. 2002.002.05. If you foresee conflicts with use of portions of this dock for public access, please inform us of the nature of these potential conflicts and how you plan to address them.

We appreciate that you have revised your construction approach in order to make the fuel dock ADA-accessible as required by Special Condition II.B.9 of Permit No. 2002.002.03 and Permit No. 2002.002.05. Please remember to submit and obtain written staff approval of the plans for this work prior to commencement of construction, as required by Special Condition II.A, Plan Review and Approval.

As stated in the letter to Ms. Jedkins, dated August 19, 2015, at Mr. Sanders request we can further modify the attached draft of Permit No. 2002.002.05 to incorporate the three items requested in Mr. Sanders' request for Amendment No. Six and issue the two amendments concurrently.

Memo heading Page 10 Phase Three a, f "Boardwalk." In the paragraph about the boardwalk, you state that items "a" and "f" under Special Condition II.B.4.Phase 2 are the same. In response to this comment, in the enclosed Version 5 of Permit No. 2002.002.05, we have omitted item "f" and modified item "a" to read "An approximately 800-foot-long and 15-foot-wide public boardwalk adjacent to the retail areas that replaces Phase 1B pathways (Amendment No. Five)." Former item "g" is now item "f."

You have requested that we add a finding stating that in Phase Three the existing decomposed granite pathway will be replaced incrementally by a boardwalk. As we stated on pages 12, 14, and 20 of our letter dated September 4, 2014, the permit must have an enforceable due date for the public access associated with each phase of development. As such, the public access improvements associated with Phase Three of the project, including the replacement of the 10-foot-wide decomposed granite pathway with a 15-foot-wide boardwalk must be completed prior to occupancy of any of the Phase Three buildings. However, as we stated on page 20, Section VI.2, of our letter dated September 4, 2014, Mr. Sanders may propose a future amendment to the permit, for example, to enable a phased implementation of the public access along this section of shoreline should he believe phased implementation is necessary. We believe that the appropriate time to consider such an amendment would be much closer to the time when Mr. Sanders is actually planning his Phase 3 build out.

Memo Heading Page 17 item P1 "Liveaboard Reporting." In this paragraph you state that BCDC's live-aboard reporting requirement "...was tied to sewage management" because live-aboard vessels require more frequent pump-outs.

Special Condition II.P.1, Live-Aboard Boats, requires that "[l]ive-aboard boats should be placed so as to increase security for the marina. The location of live-aboard boats, which may change, shall be approved by or on behalf of the Commission pursuant to Special Condition II.A (Amendment No. Five)." The condition continues by requiring that, "[t]he number of live-aboard boats shall at no time exceed ten percent of the number of authorized berths at the marina."

As noted on pages 18 and 19 of the letter dated September 4, 2014, and notwithstanding the fact that staff understands that every berth at WestPoint Harbor is connected to the shoreside sewer system, Mr. Sanders is still required to notify staff in writing of the total number of occupied marina berths, the total number of live-aboard tenants and to show their distribution. The policy basis for this requirement is that the live-aboard tenants' collective ability to increase marina security is maximized if they are distributed throughout the marina rather than located close together. Mr. Sanders agreed to this requirement by signing Permit No. 2002.002.03 on November 7, 2006.

As we have stated in the last paragraph on page 21 of our letter dated September 4, 2014, (a) we cannot administratively remove this requirement from the permit, (b) we have not asked for the names of Mr. Sanders tenants, (c) we have stated that the location of the live-aboard tenants may change, and (d) we have stated that we do not require Mr. Sanders to notify us every time there is a change in the live-aboard layout but that a once-per-year notification is sufficient to fulfill the requirements of this special condition.

You close this section of your letter by stating "[n]o marina in California with a universal pump-out system is required to report live-aboard locations, and the condition has been rendered moot by the 2006 approval of the universal pump-out system, and so should be either deleted or noted as moot." This is also an incorrect statement. As far as we are aware, this

reporting requirement is unique to BCDC because our San Francisco Bay Plan "Recreation" policies governing residential use of San Francisco Bay are unique. More importantly, and as stated on pages 18 and 19 of our letter dated September 4, 2014, this reporting requirement is distinct from waste disposal requirements, which are handled elsewhere in the permit by Special Condition II.O.4, Marine Toilets. These conditions of approval are imposed on all permittees with live-aboard authorization and would remain in place should any of these permittees install a universal pumpout system.

You also state that the Division of Boating and Waterways (DBW), in granting partial funding for Mr. Sanders' universal pumpout system, "add[ed] the additional incentive of avoiding further reporting of 'designated live-aboard' locations." As we state above on page 5 of this letter, and as we state on page 14 of our letter, dated September 4, 2014, Mr. Sanders cannot unilaterally conclude that one agency's requirements supersede or conflict with another agency's requirements. Further, you have not identified a conflict between any conditions of the DBW grant and the BCDC permit requirement but rather stated that, due to the presence of a universal pumpout system, the DBW did not impose reporting requirements associated with the marina live-aboard tenants.

Mr. Sanders has never provided the required live-aboard layout plan depicting the total number of live-aboard tenants and their distribution throughout WestPoint Harbor. He will unfortunately remain in violation of this condition until he fulfills this simple reporting requirement.

Memo Heading Page 32, G "Salt Pond Designation and Jurisdiction. In the paragraph about salt pond designation and jurisdiction, you state that at the time of permit issuance, the disposition of the jurisdiction of the property governed by Permit No. 2002.002.03 was in question so the Commission directed staff's findings to state "BCDC (staff) believes that this is a former salt pond" (Finding III.G, Commission Jurisdiction, on page 32 of the permit). Because you raised an issue with this finding, we revised its language to state that the Commission, rather than staff, finds that the parcel is a former salt pond. In response to this change, you now state that the new language "remains factually unsupported, is untrue, and is misleading." As such, the enclosed copy of Version 5 of Permit No. 2002.002.05 reinstates the original language of Permit No. 2002.002.03 as requested.

Time Extension. In Section V.1 on page five of our letter to you dated September 4, 2014, we notified you that Permit No. 2002.002.03 had expired on August 15, 2014, and that Mr. Sanders must either execute Permit No. 2002.002.05 or apply for a time extension to Permit No. 2002.002.03. As of the date of this letter, Mr. Sanders has neither executed Permit No. 2002.002.05 nor submitted a request for an extension of completion time for Permit No. 2002.002.03. Unless Mr. Sanders does not plan to execute Permit No. 2002.002.05, he should supplement his pending request for Amendment No. Six to extend Permit No. 2002.002.03's completion time to an appropriate date in the future.

Plan Approval and Installation of Public Access Improvements. Since receiving your memo dated December 22, 2014, Mr. Sanders has appointed Dawn Jedkins, a landscape architect, to represent him. Ms. Jedkins has met twice with Ms. Miramontes and Ms. Klein to discuss Mr. Sanders' plans for Phase 2, the boatyard area. While we are extremely pleased that Mr. Sanders is making progress with Phase 2, since receiving our letter dated September 4, 2014, he has not submitted any revised plans for the Phase 1B public access improvements required by Special Conditions II.A, Plan Approval, and Special Condition II.B, Public Access, of the permit and as described in Sections V.2, V.3, V.5 and V.6 of our letter to you, dated September 4, 2014. We again request that Mr. Sanders submit and obtain staff approval of plans for Phase 1B of the project as soon as possible, which will facilitate resolution of the violations described in Section V.2 on pages 5 through 8 of our letter dated September 4, 2014.

Conclusion. The permit has been modified as requested in four of eight cases with lengthy explanations for the changes we are not able to administratively make. We hope that Mr. Sanders and you find it ready for execution with the possible exceptions of his provision of revised exhibits and/or the incorporation of the items that are part of pending Amendment No. Six.

Sincerely,



ADRIENNE KLEIN
Chief of Enforcement

Enc.

AK/gg

cc: Mark and Maureen Sanders, Westpoint Harbor
Dawn Jedkins, DES Architects and Engineers Inc.
Steve Goldbeck, Deputy Director, SF BCDC
Brad McCrea, Regulatory Program Director, SF BCDC
John Bowers, Staff Counsel, SF BCDC